PEMAJU HO HOCK LAI SDN BHD

v.

PEMBANGUNAN LEONG

HIGH COURT MALAYA, KOTA BHARU
SURIYADI HALIM OMAR J
[CIVIL APPEAL NO: 12-4-2000]
12 MAY 2001

CIVIL PROCEDURE: *Action - Loan agreement - Claim for balance sum - Limitation period - Whether time of the essence - Whether defence based solely on limitation sufficient reason for striking out action - Whether defence rebuttable*

CIVIL PROCEDURE: *Striking out - Action - Limitation - Whether defence based solely on limitation sufficient reason for striking out action - Whether defence rebuttable*

The plaintiff commenced an action against the defendant for the balance of a sum of money owing under a loan agreement with the defendant. The defendant claimed the defence of limitation and the sessions judge struck out the plaintiff's action pursuant to O. 14 r. 21 of the Subordinate Courts Rules 1980. Hence, the plaintiff's appeal.

Held:

[1] The delay in payment by the defendant was clearly a variation in the loan agreement. The plaintiff affirmed that variation allegation in the record of appeal. As the respondent submitted no rebuttal evidence, the court deemed that the said variation was agreed to by the respondent.

[2] Having scrutinised the loan agreement, it was beyond argument that the matter of when payment ought to commence still remained uncertain (accentuated by the variation in the payment dates). Therefore, time was not of the essence. Consequently, the plaintiff would be required to give sufficient notice to the respondent and the respondent should respond within a reasonable period. The cause of action would arise after that reasonable period had expired. The length of time to qualify as a reasonable period will depend very much on the facts and circumstances of the case, a predicament that deserves a full-blown hearing.

[3] The total number of days, starting from the day the plaintiff was required to communicate with the respondent until the expiry period of that response would exceed the five days that the plaintiff was supposed to be out of time. If the time available before a cause of action arose could be summarised as six years plus the reasonable number of days made available to the respondent to respond (inclusive of the five days), then doubts would be created as to whether the plaintiff's case was actually out of time. That being so, identifying the point of time of the cause of action was imperative. It certainly deserved a full trial.

[4] Shorn of all the legal semantics, a defence pure and simple based on limitation is not a sufficient reason to strike out a claim. That defence merely bars a plaintiff's remedy but not his cause of action. There are too many exceptions (s. 6) as provided for by the Limitation Act 1953 to qualify it as a complete reason deserving an automatic striking out order from the presiding judge. Apart from these statutory exceptions, it will be a travesty of justice if a case is struck out notwithstanding the fact that the averment of limitation could be rebutted by fraud or by some other acceptable reason as in para. 5 of the plaintiff's affidavit in reply wherein the plaintiff explained away the delay in filing the suit.

[Appeal allowed with costs.]

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1993] 4 CLJ 7 ***(refd)***

Goh Kiang Heng v. Hj Mohd Ali Hj Abd Majid [1997] 4 CLJ Supp 320 ***(refd)***

Government of Malaysia v. Lim Kit Siang [1988] 2 MLJ 12 ***(refd)***

Nadefinco Ltd v. Kevin Corporation Sdn Bhd [1978] 2 MLJ 59 ***(dist)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(refd)***

Ronex Ltd v. John Laing Construction Ltd & Ors (Clarke, Nicholls & Marcel (a firm), third parties) [1982] 3 All ER 961 ***(refd)***

Yeo Chu Hui v. Lim Cheng Jin (f) & Anor [1993] 3 CLJ 432 ***(refd)***

Legislation referred to:

Limitation Act 1953, s. 6

Subordinate Courts Rules 1980, O. 14 r. 21(1)(a), (b), (c), (d)

For the appellant - Zainal Abidin Mustaffa; M/s Zainal & Mariani

For the respondent - Wan Azman; M/s Lua & Mansor

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar J:

The plaintiff-cum-appellant had loaned a sum of money to the respondent-cum-defendant, pursuant to an agreement dated 12 August 1991, with the last payment being made in July 1993. In spite of demands having been made after that last payment, the defendant still refused to pay up the balance to the tune of RM30,000, hence the filing of this suit. The summons was filed on 26 August 1999, which in the parlance of the non-legal world be construed as being out of time. Not surprisingly the defendant in the statement of defence, filed on 20 September 1999 adverted to this defence. On 4 October 1999 the defendant supported by an affidavit, filed a striking out action pursuant to O. 14 r. 21 of the Subordinate Courts Rules 1980. This provision reads as follows:

> (1) The Court may at any stage of the proceedings order to be struck out or amended and pleading or the endorsement, of any summons or anything in any pleading or in the indorsement, on the ground that:
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> (a) it discloses no reasonable cause of action or defence, as the case may be; or
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> (b) it is scandalous, frivolous or vexatious; or
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or
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> (d) it is otherwise an abuse of the process of the Court;
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> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
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> (2) No evidence shall be admissible on an application under paragraph (1)(a).

Objecting to that application the plaintiff filed its affidavit-in-reply. On 17 January 2000 the court allowed the application, and struck out the suit. The plaintiff filed the necessary appeal and after hearing the appeal I allowed the appeal with costs. I now supply my reasons for that decision.

The application to strike out the suit was clearly set out at p. 5 of the Record of Appeal (or RA15 for brevity). A perusal of this application highlighted the fact that nothing was mentioned in it of whether it was filed pursuant to sub-r. (a), (b), (c) or (d). I must add that it is not the job of a court to minutely examine the evidence at this stage, as otherwise it will be unable to conclude "on the face of it" that the plaintiff's case was obviously unsustainable. The solitary ground adverted to by the defendant was that the action was out of time (RA15). Perhaps being wiser with the passage of time, the defendant filed a supplementary-cum-corrective affidavit wherein the defendant affirmed that

the action was frivolous, vexatious and an abuse of the process of the court, again stating the limitation period issue as the sole ground of the application. In brief the defendant had adverted to the combined provisions of O. 14 r. 21 sub-r. 1 (b) and (d). If I may interpret it from a different perspective, if I were not to be convinced that the action was out of time, or that the solitary ground of limitation was not a permissible ground in a striking out action, then I must allow the appeal and dismiss the application.

Upset with the affidavit in reply of the plaintiff, in particular exh. CYS1, the defendant again filed another supplementary affidavit, this time disputing the abovementioned exhibit, and strenuously requesting that the plaintiff prove the truth of that exhibit. From a simple case of being out of time, it had elevated itself, by the very conduct of the defendant, to one that required factual scrutiny of the facts by the court. By now I was in a quandary as to the actual premise of the application; in fact I was seriously beset by the question of whether the defence of limitation could at all be adverted to in this case pursuant to the prevailing facts.

The facts showed that had the defendant adhered to the provisions of the agreement unerringly, the debt would have been satisfied by 12 May 1992. On that score, that delay in payment was clearly a variation in the agreement. As regards this matter, suffice if I merely state that at para. 4 of RA19, the plaintiff affirmed that variation allegation. As the respondent submitted no rebuttal evidence, I must deem it that that variation was agreed to by the latter (*Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609).

I now would like to go into specifics. As agreed by both parties, the last payment of RM1,000 was made on 20 July 1993. What with the variations in the agreement, the next payment would fall on 21 August 1993. Following that mathematical interpretation the statement of claim ought to be filed by 21 August 1999, to avoid being out of time. Unfortunately the writ was only filed on 26 August 1999 exactly five days out of time. But, was the action in actuality out of time?

The learned counsel for the defence supplied the court the case of *Nadefinco Ltd. v. Kevin Corporation Sdn. Bhd*. [1978] 2 MLJ 59, which at first blush seemed to support the latter's case. Similar to the current case, the facts there revealed that a mining company was in arrears, pursuant to a loan offered by the respondents, to the tune of RM130,000. The appellants were the guarantors. The first instalment was scheduled to be paid on 20 January 1968 but none was forthcoming. On 1 November 1971 the company was unfortunately wound up. The respondents filed a claim on 19 June 1975 whereupon the appellants pleaded limitation. The respondents ambitiously applied for summary judgment, and even though disallowed at the senior assistant registrar stage, on appeal

to the High Court were permitted to sign final judgment. The appellant appealed. The question that arose was, when did the cause of action begin, namely, was it when there was failure to pay the instalment, or when the company was wound up? The Federal Court there held that the cause of action accrued the instant there was failure to pay the instalment. As the action was out of time, the final judgment was set aside, and the defendant permitted to defend the case unconditionally. I was not unaware that the intention of the submission of this case by the defendant was to convince me that, by analogy the cause of action in the current case arose on 21 August 1993 thus barring the plaintiff from proceeding with this action. Having appreciated the facts of the above case, with due respect to his diligence and ingenuity, I must at the outset state that the facts there are distinguishable with the current ones. In *Nadefinco Ltd* the crux of the issue was whether the cause of action began on a fixed and identifiable date ie, at the instalment payment date or at a later date, that was when the company went bust (on meaning of "cause of action" see *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12). In *Nadefinco Ltd* there was certainty as to the date of the payment; and time was of the essence in the material agreement.

In the current case the facts revealed a totally different picture. Having scrutinised the agreement in the current case, it was beyond argument that the matter of when payment ought to commence still remained uncertain (accentuated by the variation in the payment dates). At the end of the day I was satisfied that time was not of the essence in the agreement. Consequently, certainly being very interested with the agreement as it was the party being owed, the plaintiff would be required to give sufficient notice to the respondent, and for the latter to respond to the query within a reasonable period (see para. 4 of the statement of claim pertaining to the overt act of the plaintiff, demanding payment of the said debts). In other words, after the failure of the respondent to pay the necessary instalment, the plaintiff was expected to communicate with the respondent, and submit the relevant claim. The cause of action will arise after that reasonable period had expired. What that length of time was ie, to qualify to be reasonable, will depend very much on the facts and circumstances of the case, a predicament that deserves a full-blown hearing. What was certain was that the total number of days, starting from the day the plaintiff was required to communicate with the respondent, until the expiry period of that respond, will exceed the five days that the plaintiff was supposed to be out of time. In a worst case scenario, if the time available before a cause of action arose, could be summarised as six years plus the reasonable number of days made available to the respondent to respond (inclusive of the five days), then doubts would be created as to whether the plaintiff's case was actually out of time. That being so identifying the point of time of the cause of action was imperative. It certainly deserved

a full trial. On that premise, by no stretch of the imagination thereafter could I conclude that this was a plain and obvious case, where the claim was obviously unsustainable on the face of it (*Bandar Builder Sdn. Bhd & Ors v. United Malayan Banking Corp Bhd.* [1993] 4 CLJ 7).

Notwithstanding the above poser another pertinent question, which deserved some attention was whether, a defence pure and simple based on limitation, was sufficient reason to strike out a claim? Shorn of all the legal semantics, the answer is in the negative. This is so as that defence merely bars a plaintiff's remedy but not his cause of action (*Ronex Ltd v. John Laing Construction Ltd and Others (Clarke, Nicholls & Marcel (a firm), third parties)* [1982] 3 All ER 961; *Goh Kiang Heng v. Hj Mohd Ali bin Hj Abd Majid* [1997] 4 CLJ Supp 320). There are too many exceptions (s. 6), as provided for by the Limitation Act 1953 to qualify it as a complete reason deserving an automatic striking out order from the presiding judge (*Yeo Chu Hui v. Lim Cheng Jin (f) & Anor* [1993] 3 CLJ 432). Apart from these statutory exceptions, it will be a travesty of justice if a case were to be struck out, despite the fact that the averment of limitation could be rebutted by fraud or by some other acceptable reason (see para. 5 of the affidavit-of-reply where the plaintiff explained away the delay in filing the suit; *Ronex Properties Ltd (supra)*).

To wind up the matter based on the above reasons, *inter alia*, that it was unclear when the cause of action had arisen, what with a cause of action still in existence in spite of a defence of limitation, I had no hesitation in allowing the appeal with costs.